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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ROBERT ALAN WOLF,

12 Plaintiff,

13 v.

14 STATE OF WASHINGTON, et al.,

15 Defendants.

CASE NO. C09-5448BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM AND
GRANTING DEFENDANTS'
MOTION FOR EXTENSION
OF TIME TO FILE ANSWER

17 This matter comes before the Court on Defendants' unopposed motion to dismiss
18 for failure to state a claim upon which relief can be granted (Dkt. 23) and its motion for
19 an extension of time to answer (Dkt. 25). The Court has considered the pleadings filed in
20 support of the motions and the remainder of the file and hereby grants the motions for the
21 reasons stated herein.

22 **I. PROCEDURAL BACKGROUND**

23 On July 30, 2009, Plaintiff filed his complaint against Defendants. Dkt. 6. On
24 December 24, 2009, Defendants moved the Court to dismiss certain of Plaintiff's claims
25 pursuant to Fed. R. Civ. P. 12(b)(6) (failure to state a claim). Plaintiff did not respond to
26 Defendants' motion.
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Additionally, on December 29, 2009, Defendants moved the Court for an extension of time to file their answer. Dkt. 25. This motion for extension is unopposed and supported by the declaration of Scott E. Michael. Dkt. 26 (Michael Decl.).

II. FACTUAL BACKGROUND

A. Motion to Dismiss

Plaintiff appears in this litigation pro se. See Dkt. 6 (the Complaint). Plaintiff filed a 42 U.S.C. § 1983 civil rights action against Defendants regarding alleged actions of the treating staff and his social worker at Western State Hospital¹ (“WSH”). Plaintiff alleges that during his involuntary commitment at WSH, the treatment staff acted in such a manner that violated his Fifth and Fourteenth Amendment rights to due process. Dkt. 6 (the “Complaint”). He also alleges that his social worker ignored his requests for assistance.

B. Motion for Extension to File Answer

Defendants’ motion to extend is supported by declaration. *See* Dkt. 25 (referring to Michael Decl.). Defendants urge the Court to grant this motion because of extenuating circumstances which have, to date, prevented Defendants’ counsel from interviewing one of the Defendants in order to file an informed answer. Michael Decl. ¶¶ 1-6.

III. DISCUSSION

A. Standard

Federal Rule of Civil Procedure 12(b)(6) permits challenge of a complaint for “failure to state a claim upon which relief can be granted.” A court’s inquiry “is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). The defendant bears the burden of proving plaintiff has failed to state a claim. *See, e.g., Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005); *Bangura v. Hansen*,

¹WSH is a state institution for the treatment of the mentally ill.

434 F.3d 487, 498 (6th Cir. 2006); James Wm. Moore, 2 *Moore's Federal Practice* § 12.34[1][a] at 12-73 (2008 ed.).

A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999); *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint or any claim within it “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

When a plaintiff is pro se and alleges civil rights violations, the court must construe the allegations liberally and grant plaintiff leave to amend “unless it clearly appears that the deficiency cannot be overcome by amendment.” *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (internal citation omitted). *See also Jones v. Cmty. Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (“The allegations of a *pro se* complaint, however inartfully pleaded, should be held to less stringent standards than formal pleadings drafted by lawyers”) (internal citation omitted).

B. Motion to Dismiss

“If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit.” Local Rule CR 7(b)(2). Plaintiff has not responded to Defendants’ motion to dismiss. The Court is inclined to find that Defendants’ motion has merit. Because Plaintiff is proceeding pro se, the claims are dismissed pursuant to Rule 12(b)(6) without prejudice, leaving Plaintiff with an opportunity to amend his complaint.

Defendants accurately summarize Plaintiff’s complaint as alleging the following violations of his civil rights:

(1) Treating staff did “order and direct an involuntary treatment of Ativan.”

1 (2) Plaintiff was denied ground privileges, authorized leaves, special
2 privileges to go off grounds, and “the right to participate in treatment at the
treatment mall.”

3 (3) Plaintiff’s decision to remain silent was used against him as
evidence of “mental deterioration.”

4 (4) Plaintiff’s social worker ignored and neglected requests to assist
5 plaintiff in reconciling an error made by plaintiff’s bank.

6 *See* Dkt. 23 at 2 (citing the Complaint).

7 Defendants moves the Court to grant the following relief:

8 That all of plaintiff s claims be dismissed for failure to state a claim
upon which relief can be granted pursuant to CR 12(b)(6), *except for*
9 plaintiff’s claim alleging an involuntary administration of Ativan which
allegedly occurred on or about the beginning of September 2007.

10 That plaintiff should be granted leave to amend his complaint unless
this Court determines that the complaint could not possibly be cured by the
allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1127 (2000).

11 Discovery should be limited to only plaintiff’s claim alleging an
12 involuntary administration of Ativan which allegedly occurred on or about
the beginning of September 2007.

13 Dkt. 23 at 10 (emphasis added).

14 **1. Involuntary Treatment with Ativan**

15 This issue is not the subject of Defendant’s motion and remains an issue in this
16 litigation.

17 **2. Denial of Grounds Privileges, Authorized Leaves, Treatment Malls**

18 Plaintiff complains that he was denied grounds privileges, authorized leaves, and
19 the ability to go to the “treatment malls.” Complaint at 5. Plaintiff appears to be arguing
20 that the treatment staff violated his constitutional liberty interest in remaining free from
21 unreasonable restraint when he was denied these privileges. *See id*; *see also* Dkt. 6-2
22 (Civil Cover Sheet citing Fifth and Fourteenth Amendment violations, claiming unlawful
23 imprisonment).

24 For Plaintiff to be successful on this issue, he must allege facts that, if true, would
25 establish that the treatment staff failed to exercise professional judgment when it
26 allegedly restricted his various privileges. *See Youngberg v. Romeo* (applying rule to state
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1 institution for mentally retarded); *see also* U.S.C.A. Const. Amend. 14. Plaintiff did not
2 make any such allegation in his complaint, which is fatal to this claim.

3 Although Plaintiff is proceeding pro se, the Court has no authority to supply for
4 Plaintiff facts that would satisfy this element for purposes of escaping dismissal under
5 Rule 12(b)(6). *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). The *Pena* court noted
6 that “a liberal interpretation of a [pro se] civil rights complaint may not supply essential
7 elements of the claim that were not initially pled. Vague and conclusory allegations of
8 official participation in civil rights violations are not sufficient to withstand a motion to
9 dismiss.” *Id.* (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th
10 Cir. 1982)). Accordingly, the Court will not supply facts regarding the treatment staff’s
11 exercise or failure to exercise professional judgment in Plaintiff’s case.

12 Therefore, the Court dismisses Plaintiff’s claim on this issue without prejudice
13 because he has not stated a claim upon which relief can be granted.² *See* Fed. R. Civ. P.
14 12(b)(6).

15 **3. Fifth Amendment Right to Remain Silent**

16 In his complaint, Plaintiff appears to allege that his right against self incrimination
17 was violated when his silence “was being used as evidence of mental deterioration [sic] at
18 the time of treatment” and because he “was forced to renounce” this right until he was
19 discharged from WSH. Complaint at 5.

20 By its own terms, the Fifth Amendment right against self-incrimination is only
21 applicable to criminal cases. *See* U.S.C.A. Const. Amend. 5 (No person “shall be
22 compelled in any *criminal* case to be a witness against himself.”) (emphasis added).

23 ²Defendants seek to dismiss Plaintiff’s claim regarding his liberty interest in being free
24 from unreasonable restraint on two bases. One regards the failure to show that the treatment staff
25 exercised professional judgment, discussed above. The second regards whether the restraints
26 imposed on Plaintiff were atypical and a significant hardship. Dkt. 23 at 3-6. To establish this
27 second basis, Defendants urge the court to extend existing law on rules regarding prison inmates
28 to situations such as these, regarding patients involuntarily committed to state hospitals. The
Court need not reach this issue given Defendants’ other sufficient basis on which to dismiss the
claim under Rule 12(b)(6), discussed above.

1 However, case law “establishes that the privilege applies to any type of proceeding be it
2 criminal, civil, administrative, judicial, investigative, or adjudicatory where a witness may
3 reasonably apprehend that his statements *could be used in a criminal proceeding* or could
4 lead to other evidence which might be so used.” *French v. Blackburn*, 428 F. Supp. 1351
5 (D.C.N.C. 1977), *summarily aff’d*, 443 U.S. 901 (1979) (citing *In re Gault*, 387 U.S. 1
6 (1967)) (emphasis added).

7 Any silence of Plaintiff here does not appear to give rise to the exception to the
8 general rule limiting the right against self-incrimination to criminal cases. Therefore, the
9 Court dismisses Plaintiff’s claim without prejudice because he has not stated a claim for
10 which relief can be granted on this issue. *See* Fed. R. Civ. P. 12(b)(6).

11 **4. State’s Duty to Prevent Harm By Non-State Actors**

12 The Due Process Clause and the “under color of state law” element found within
13 42 U.S.C. § 1983 do not permit causes of action based merely on private conduct, “no
14 matter how discriminatory or wrongful.” *Am. Mfr. Mut. Ins. Co. Sullivan*, 526 U.S. 40,
15 49-50 (1999) (quoting *Shelley v. Kraemer*, 334 U.S. 1 (1948)). To succeed in his apparent
16 claim that Defendants deprived him of property, Plaintiff must establish that more than
17 mere private conduct caused the alleged deprivation. *See id.*

18 Plaintiff alleges that while he was hospitalized his “bank account was robbed and
19 [his] attempts to reconcile [his] bank account with U.S. Bank in a timely manner was
20 sabotaged by the treatment team . . . , and any and all attempts to request [that his] social
21 worker . . . assist [him] . . . was intentionally ignored and neglected” Complaint at 5.
22 Defendants argue, and the Court agrees, that Plaintiff’s allegation “only shows that a
23 private party – not the State – deprived [P]laintiff of money in his bank account.”

24 Because Plaintiff fails to establish that the treatment team or the social worker
25 owed Plaintiff a duty to assist with his private party banking dispute, the claim is
26 dismissed without prejudice. *See* Fed. R. Civ. P. 12(b)(6).

1 **C. Defendant's Motion for Extension**

2 Plaintiff has not opposed Defendants' motion to extend. Defendants, through the
3 Michael Declaration, assert the following reasons for the extension:

4 2. On November 9, 2009, Western State Hospital received by mail
5 from the U.S. Marshals Office a copy of plaintiff's summons and
6 complaint.

7 3. The summons and complaint named one of the defendants as
8 "Nurse Cindy." There was no information as to Nurse Cindy's last name or
9 a physical description of Nurse Cindy. Western State Hospital was required
10 to conduct an investigation to determine precisely who plaintiff intended to
11 sue.

12 4. The substance of plaintiff's complaint mentioned events that
13 allegedly occurred "on or about the beginning of September 2007, on ward
14 S-3. . . ." Based on this information, were able to determine that Cynthia
15 Baker is the only nurse named "Cindy" who worked on that ward at that
16 time. This determination was not made until November 17, 2009.

17 5. On Monday, December 7, 2009, I had a telephone conversation
18 with Cynthia Baker. She has recently received a serious medical diagnosis,
19 the details of which can be disclosed if the Court so requests. Ms. Baker
20 informed me she was scheduled to undergo a major medical operation
21 during the week of December 14, 2009, which would leave her
22 incapacitated and unable to discuss this case for about two months. I have
23 no reason to believe this operation did not occur.

24 Michael Decl. In short, Defendants request time for Ms. Baker's recovery so they may
25 file an informed answer to Plaintiff's complaint. The Court concludes that Defendants
26 have shown good cause for the extension (Michael Decl.), and extends the deadline for
27 Defendants to file their answer until March 22, 2010.

28 **D. Conclusion**

Pursuant to Rule 12(b)(6), Plaintiff's claims are dismissed without prejudice,
except that his claim for involuntary administration of Ativan remains. Plaintiff is
permitted to amend his complaint to cure the currently deficient pleading, which must be
filed on or before March 1, 2010. Unless Plaintiff cures the pleading deficiencies
discussed herein, discovery will be limited to Plaintiff's claim regarding the involuntary
administration of Ativan.

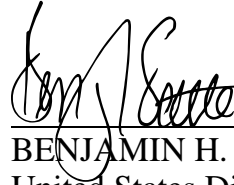
Additionally, the deadline for Defendants' to file their answer is extended as
discussed above.

1 **IV. ORDER**

2 Therefore, it is hereby

3 **ORDERED** that, as discussed herein, Defendants' motion to dismiss for failure to
4 state a claim (Dkt. 23) is **GRANTED**, and Defendants' motion for extension to file
5 answer (Dkt. 25) is **GRANTED**.

6 DATED this 22nd day of February, 2010.

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BENJAMIN H. SETTLE
United States District Judge